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SAVANT-ASIA SDN BHD

v.

SUNWAY PMI-PILE CONSTRUCTION SDN BHD

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FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ARIFIN ZAKARIA FCJ
HASHIM YUSOFF FCJ
[CIVIL APPEAL NO: 02-22-2005 (W)]

C

26 SEPTEMBER 2008

COMPANY LAW: *Winding up - Petition - Advertisement of petition - Whether petitioner may be excused from advertising fact of petition after debt had been fully paid - Defence of absolute privilege - Companies Act 1965, s. 218(1)(e), (2)(a) - Rules of the High Court 1980, O. 14A*

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In this appeal against the majority decision of the Court of Appeal dismissing the appellant's appeal in respect of an action of libel brought by the respondent against the appellant in the High Court, the following question of law was posed: Where a winding up petition on grounds of presumed insolvency under s. 218(1)(e) read together with s. 218(2)(a) of the Companies Act 1965 ('Act') has been filed and served on a respondent and the respondent pays the sum stated in the petition to the petitioner, whether, under the legislative scheme of winding up of companies, a petitioner is excused from advertising the fact of the petition and surreptitiously keeping the money for himself to the exclusion of the creditors at large of the respondent and, subsequently, withdrawing the petition that is unadvertised. The single issue requiring determination was whether a petitioner in a winding up petition may be excused from advertising the fact of the petition after the debt had been fully paid by the respondent. If the answer to this question were in the negative, then the appellant would succeed in its defence of absolute privilege.

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Held (allowing the appeal)
Per Arifin Zakaria FCJ delivering the judgment of the court:

(1) The advertisement was a mandatory requirement under the Act and the Companies (Winding-Up) Rules 1972 ('Rules'), and the fact that the appellant had received payment of the debt was all the more reason for the need for the petition to be advertised. In any case, the petition herein was based on

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the deemed insolvency of the respondent under s. 218(1)(e) read together with s. 218(2)(a) of the Act. It arose out of the respondent's failure to pay its debt within three weeks from the service of demand on it. Therefore, the respondent could not argue that it was able to pay its debt, because under the Act the respondent was deemed to be unable to pay its debt by its own failure to comply with the demand. The payment of the debt after the petition had been filed did not in any way alter the situation. In the circumstances, this court would agree with Abdul Aziz Mohamad JCA (the dissenting judge in the Court of Appeal decision) that "to omit to advertise the petition would directly assist the appellants to surreptitiously keep the money exclusively to themselves, in the event that there were other creditors". Hence, under the scheme of the Act and the Rules, the advertisement was clearly mandatory and, in the circumstances, absolutely privileged. This would fall squarely under the second category of absolute privilege as mentioned by Devlin LJ in *Lincoln v. Daniels*. Clearly, this was a fit and proper case to be decided under O. 14A of the Rules of the High Court 1980 on the single issue as posed to this court. Accordingly, the answer to the question posed was in the negative. (paras 33, 34 & 38)

Bahasa Malaysia *Translation Of Headnotes*

Di dalam rayuan ini menentang keputusan majoriti Mahkamah Rayuan yang menolak rayuan perayu berkenaan dengan sesuatu tindakan libel yang dimulakan oleh responden terhadap perayu di dalam Mahkamah Tinggi, soalan undang-undang yang berikut telah dikemukakan: Di mana sesuatu petisyen penggulungan berdasarkan alasan anggapan ketaksolvenan di bawah s. 218(1)(e) dibaca bersama s. 218(2)(a) Akta Syarikat 1965 ('Akta') telah difail dan disampaikan kepada responden dan responden telah membayar jumlah yang dinyatakan di dalam petisyen kepada pempetisyen, sama ada, di bawah skim perundangan penggulungan syarikat-syarikat, seseorang pempetisyen dikecualikan dari mengiklankan petisyen tersebut dan secara curi-curi menyimpan duit tersebut untuk dirinya sendiri sehingga mengetepikan pemiutang-pemiutang umum lain responden dan, seterusnya, menarik balik petisyen yang tidak diiklankan. Isu tunggal yang perlu dibicara ialah sama ada seseorang pempetisyen dalam sesuatu petisyen penggulungan boleh dikecualikan dari mengiklankan petisyen tersebut selepas hutang

telah dibayar dengan sepenuhnya oleh responden. Jikalau jawapan kepada soalan ini ialah negatif, pembelaan perlindungan mutlak perayu akan berjaya.

Diputuskan (membenarkan rayuan)

Oleh Arifin Zakaria HMP menyampaikan penghakiman mahkamah:

(1) Pengiklanan tersebut merupakan sesuatu keperluan mandatori di bawah Akta dan Kaedah-kaedah (Penggulungan) Syarikat 1972 ('Kaedah-kaedah'), dan fakta bahawa perayu telah menerima pembayaran hutang tersebut lebih banyak lagi menyebabkan perlunya membuat pengiklanan petisyen tersebut. Bagaimanapun, petisyen di dalam kes ini telah didasarkan ke atas ketaksolvenan responden di bawah s. 218(1)(e) dibaca bersama s. 218(2)(a) Akta. Ia timbul daripada kegagalan responden untuk membayar hutangnya dalam jangka masa tiga minggu dari penyampaian tuntutan ke atasnya. Oleh itu, responden tidak boleh mengadu bahawa ia berupaya membayar hutangnya, kerana di bawah Akta responden telahpun dianggap tidak boleh membayar hutangnya disebabkan kegagalannya sendiri untuk mematuhi tuntutan tersebut. Pembayaran hutang tersebut selepas petisyen telah difail tidak dalam apa cara pun mengubah situasi itu. Dalam halkeadaan sedemikian, mahkamah ini bersetuju dengan Abdul Aziz Mohamad HMR (hakim menentang dalam keputusan Mahkamah Rayuan) bahawa "untuk tidak mengiklankan petisyen tersebut akan secara terus membantu perayu-perayu secara curi-curi menyimpan duit tersebut untuk diri mereka secara ekslusif, jikalau terdapat pemiutang-pemiutang lain". Oleh itu, di bawah skim Akta dan Kaedah-kaedah, pengiklanan tersebut jelas mandatori dan, dalam halkeadaan sebegitu, dilindungi secara mutlak. Ini terangkum di bawah kategori kedua perlindungan mutlak seperti yang disebut oleh Devlin LJ di dalam *Lincoln v. Daniels*. Dengan jelas, ini merupakan kes yang patut dan seharusnya dibicara di bawah A. 14A Kaedah-kaedah Mahkamah Tinggi 1980 di atas isu tunggal yang dikemukakan di mahkamah ini. Oleh yang demikian, jawapan kepada soalan yang dikemukakan ialah negatif.

Case(s) referred to:

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***

European Asian Bank AG v. Punjab and Sind [1983] 2 All ER 508 ***(refd)***

GKM Amal Bhd v. Bank Utama (M) Bhd [2004] 1 CLJ 769 CA ***(refd)***

Kredin Sdn Bhd v. Development & Commercial Bank Bhd [1995] 4 CLJ 19 CA ***(refd)***

Lincoln v. Daniels [1962] 1 QB 237 ***(foll)***

Fairview School Bhd v. Indrani Rajaratnam (No 1) [1998] 1 CLJ 285 CA ***(refd)***

Re United Stock Exchange Ltd, ex parte Philip & Kidd [1885] 28 Ch D 183 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(e), (2)(a), 219(2), 221(2)(b), (e), 222, 223, 224, 226(4)

Companies (Winding-Up) Rules 1972, rr. 24, 27, 33(1)(a), (b), (c), 194(1)

Contracts Act 1950, s. 24

Rules of the High Court 1980, O. 14A, O. 33 rr. 2, 5

For the appellant - Dato' Loh Siew Cheang (Cindy Goh Joo Seong & Keith Goh Hong Yin with him); M/s Cheang & Ariff

For the respondent - Serdracharman Raman (K Venkateswara with him); M/s David Lingam & Co

[Appeal from Court of Appeal; Civil Appeal No: W-02-244-2004]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria FCJ:

Background

[1] This is an appeal against the majority decision of the Court of Appeal dated 17 June, 2005 (Abdul Aziz Mohamad JCA (as he then was) dissenting) in dismissing the appeal by the appellant.

The Facts

[2] The undisputed facts of the case are as follows:

[3] A petition for winding-up was filed by Savant Asia Sdn. Bhd. ("the appellant") through its solicitors, Zaid Ibrahim & Co., on 22 March 1999 in respect of a debt of RM141,750 owed by Sunway

PMI-Pile Construction Sdn. Bhd. ("the respondent"). The hearing date was fixed on 3 September 1999. The petition was served on the respondent on 23 April 1999. On 4 May 1999, the respondent tendered a cheque to the appellant for the exact amount of RM141,750. The cheque was cleared on 11 May 1999. The petition however was published in the Star newspaper on 12 May 1999 despite the fact that the debt had been settled on 11 May 1999.

[4] The respondent brought an action at the High Court against the appellant for libel on account of the advertising of the petition in the Star newspaper on 12 May 1999 by the appellant after the debt had been fully settled. Joined as the 2nd defendant in the High Court were the solicitors who acted for the appellant in the winding-up proceedings ("the solicitors").

[5] The respondent alleged that there was malicious intention on the part of the appellant since the respondent has already settled the debt.

[6] In the libel action the appellant and the solicitors were separately represented.

[7] Both the appellant and the solicitors deny that there was malicious intention on their part on the grounds that there was a legal duty on their part to proceed with the advertisement of the petition notwithstanding the settlement of the debt by the respondent.

[8] In the course of the proceedings the appellant and the solicitors applied under O. 14A and/or O. 33 r. 2 and 5 of the Rules of High Court 1980 (the RHC) for the issue of absolute/qualified privilege raised in the pleading to be tried as a preliminary issue before the trial of the action and all further proceedings to be stayed.

[9] The learned High Court Judge after hearing submissions on 22 May 2003 on the suitability of the two summonses, directed the appellant to adopt the question as framed by the solicitors for the sake of convenience and to facilitate proceedings. The appellant did not object. The issue as framed reads as follows:

> Whether upon the facts as alleged in paragraphs 6, 7 and 10 of the statement of claim and the defence of absolute privilege and/or qualified privilege raised and pleaded in paragraph 23 and 24 of the statement of defence of the second defendant, the plaintiff's claim is maintainable in law and/or in fact by reason of absolute and/or qualified privilege.

[10] The application was dismissed. The learned High Court Judge agreed that the advertisement is a mandatory requirement, but if and only if the appellant intends to proceed with the hearing of the petition. In his grounds of judgment, the learned judge expressed his finding in the following words:

> I have dismissed the defendants' applications on the ground that since there is an allegation by the plaintiff of malicious intent on the part of the defendants, which the defendants deny (hence there is a dispute on a material fact), I do not think that it is appropriate that I should consider the issue of qualified privilege as raised by the defendants as a preliminary issue and without the need for a trial. It would have been a different matter if malicious intent is not an issue, or that the allegation of malicious intent is not disputed by the defendants.
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> Further, there is another difficulty: the defendants' application is based on a misconception of the law – the misconception being that under rule 24 of the Company (Winding-Up) Rules 1972 it was mandatory for them to advertise the petition. True, it was mandatory for them to advertise the petition within the prescribed period: but it was only mandatory if the defendants intended to proceed with the hearing of the petition. In the present case, however, it was clear to the defendants that they had no reason to proceed with the petition as the debts had already been settled.

[11] The appellant and the solicitors appealed to the Court of Appeal.

Court Of Appeal

[12] Before the Court of Appeal, learned counsel for the appellant (the 1st appellant in the Court of Appeal) sought determination of the court on the issue of absolute privilege contending that that was the basis of its application and also the pleaded defence of the appellant. In adopting the same submission the solicitors contended that they were merely acting in the course of their duties in publishing the said advertisement.

[13] Tengku Dato' Baharuddin Shah, JCA in dismissing the appeal, addressed the issue in the following manner:

> The basis of the respondents' claim is the appellants' insistence in publishing the advertisement despite having given the undertaking to withdraw the petition upon the clearance by the bank of the respondent's cheque for full payment of claim. While the second appellant denied any knowledge of the alleged settlement, the first appellant claimed to only know about the clearance of the cheque on the day the advertisement was published and at the same time claiming to act at all times on the advice of the second appellant. These are disputes of fact which can only be resolved by evidence at a full trial. Therefore as an issue of law the question posed failed the test of suitability for determination under O. 14A as earlier mentioned. It also assumes facts not discernible from the statement of claim and defence, hence inappropriate for pre-trial determination.
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> On the issue of absolute privilege, there is not only factual dispute but also misconception of the law. The first appellant claimed to cause the publication as part of his statutory obligation ie, "partial fulfillment" of the requirement of r. 24. The second appellant purported to publish the advertisement "pursuant to requirements in law". The respondent's stand is that the petition is not required to be advertised unless the appellant is definitely proceeding with it and even then the publication may only be made within the period prescribed by rule 24 ie, seven clear days before the hearing date. Here the publication was done on the 12th of May 1999, well before the hearing date fixed on the 3rd of September 1999 and despite the undertaking and settlement. Thus, whether there was any necessity to publish and whether such publication was done pursuant to the requirement of the law were neither proven nor admitted.
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> Furthermore, the line of defence taken gave the learned Judge the impression that there was a misconception of the law on the part of the appellant that advertisement is mandatory once a petition is filed when the law appears to view publication outside the prescribed period as a breach of the Rules and an irregularity. The proposed issue is therefore obscure and not discernible from pleadings.Particularly so when the pivotal averments in paragraphs 9 and 10 of the statement of claim are still in dispute. In any event, Section 221(2) of the Companies Act 1965 provides for the withdrawal of a winding-up petition by the petitioner at any time.

For the aforesaid reasons, the issue as framed is neither suitable nor possible for determination under O. 14A.

O. 33 r. 2 of the RHC is apparently wider in scope as it encompasses "any question or issue arising in a case or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise".

In any event, the issue as framed incorporates both defences of absolute privilege and qualified privilege, hence two issues. Assuming that the facts are undisputed or admitted (when they are not) the answers would not dispose of the entire cause or matter unless held in the appellant's favour. It is not therefore a question that is appropriate for preliminary determination under O. 33 as it would neither save time nor cost.

[14] Dato' Abdul Aziz Mohamad, (dissenting) in his judgment held as follows:

After considering the submissions on both sides, I arrived at the conclusion that it was for the very reason that they had received full payment of their debt that the appellants had to advertise the petition. By virtue of Section 219(2) of the Companies Act 1965 the winding-up of the respondent company had commenced on 22 March 1999 when the winding-up petition was presented. The money that the appellants received from the respondents on 11 May 1999 did not legally belong to the appellants alone because the payment constituted a disposition of the property of the respondent company made after the commencement of the winding-up, which Section 223 declares to be void in the absence of a court order otherwise. Other creditors, if there were any, had an interest in it. By virtue of Section 226(4), if there had been a winding-up order, it would operate in favour of them as well.

[15] Further down he added:

The judge was speaking of "malicious intent" in relation to the defence of qualified privilege. But although the issue that was framed for the appellants, which was an adoption of the issue framed by the winding-up solicitors, included also the defence of qualified privilege, the appellants' application by summons in chambers concerned only the defence of absolute privilege. In any event the issue as adopted for the appellants concerned also the defence of absolute privilege, to which the question of malice would not be relevant and on which, if it availed the appellants, they would succeed in defeating the respondents' claim, making the defence of qualified privilege unnecessary. The learned judge

A therefore erred in dismissing the application on the first ground in not considering that the appellants also relied on the defence of absolute privilege and the issue posed also related to that defence.

The Issues In Contention

B **[16]** Leave to appeal was granted by the Federal Court on 28 September 2005 and the following question of law was posed to this court:

Where a winding-up petition on grounds of presumed insolvency C under s. 218(1)(e) read together with s. 218(2)(a) of the Companies Act 1965 has been filed and served on a respondent and the respondent pays the sum stated in the petition to the petitioner, whether under the legislative scheme of winding-up of companies, a petitioner is excused from advertising the fact of the D petition and surreptitiously keep the money for himself to the exclusion of the creditors at large of the respondent and subsequently withdrawing the petition that is unadvertised.

[17] The learned counsel for the appellant submitted before us E that:

(a) the learned majority members of the Court of Appeal failed to fully appreciate the statutory purposes which the various provisions of the Companies Act 1965 (the Act) and the Companies (Winding-up) Rules 1972 (the WUR) seek to F achieve when winding-up has commenced upon presentation under s. 219(2) of the Act. On the examination of the relevant provisions, the need to advertise is not dependent upon the subjective intention of a petitioner whether to proceed with the petition or not. Even if there was a bargain G not to advertise, that bargain is unenforceable pursuant to s. 24 of the Contracts Act 1950. If the statutory duty to advertise is dependent on the intention or bargain of the parties, it directly conflicts with the legislative scheme of winding-up of companies; and

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(b) A winding-up petition under s. 218(1)(e) read together with s. 218(2)(a) of the Act immediately raises a rebuttable presumption of insolvency and the application of several statutory provisions affecting the conduct of the petitioner and I the respondent under the Act and the WUR. The petition also cannot be withdrawn without leave under s. 221(2)(e) of the Act. The statutory characteristic of "class remedy" of a

winding-up petition is revealed in several provisions of the Act. Once winding-up has commenced, the Act operates prospectively and retrospectively in upholding the *pari passu* principle to protect the relevant class ie, in this case the general body of unsecured creditors.

[18] The respondent's counsel in the other hand submitted that:

(a) The Federal Court cannot sanction and authorize the publication to the world at large by way of newspaper advertisements and gazette notifications, total falsehoods and lies;

(b) The basis of the Act and WUR as interpreted by judicial authority is to secure the payment of a debt, given the emphasis on non-payment and the judicial setting aside of unsubstantiated debts at hearing;

(c) The court's role is to apply the law practically and substantively to interpret statute accordingly to the facts of each case;

(d) Where the debt is paid before the advertisement of a petition within the specific facts of this case, the appellant is not expected to proceed with advertisement of a winding-up petition where the advertisement itself is false, there is no longer any *locus standi* to do so and where the respondent was clearly not a company unable to pay its debts as described under the statutory scheme of winding-up;

(e) The appellant chose to disregard the fact that full payment had been made by not withdrawing the advertisement; and

(f) Given the draconian nature and commercial repercussions of advertising a winding-up petition with the undue and unwarranted prejudice to the respondent, this has resulted in an abuse to the winding-up process and severe policy implications for business which have in good faith paid off their debts to continue with business.

Our Finding

[19] The single issue before us is whether a petitioner in a winding-up petition may be excused from advertising the fact of the petition after the debt had been fully paid by the respondent. If the answer to this question is in the negative then the appellant would succeed in its defence of absolute privilege.

[20] In this case the payment was made by the respondent by cheque on 4 May 1999 and the cheque was cleared on 11 May 1999, well before the hearing date of the petition which was fixed on 3 September 1999. The respondent's contention simply put is that since payment had already been made the petition no longer serves its purpose and the advertisement in the newspaper was no longer necessary and the appellant ought in the circumstances to have withdrawn the said advertisement.

[21] It is pertinent to note that the petition herein was grounded on the presumed insolvency under s. 218(1)(e) read together with s. 218(2)(a) of the Act. And under s. 219(2) it is provided that the winding-up shall be deemed to have commenced at the time of the presentation of the petition for the winding-up. This provision has many important consequences, one of which is that once the winding-up petition has been duly presented it sets in motion the relevant provisions of the Act and the WUR *vis-à-vis* the respondent. Hence the validity of the respondent's argument that since the appellant's debt had been fully settled by the date the advertisement was published in the newspaper, the appellant is therefore no longer obliged to advertise does not hold water. In this case the winding-up petition was presented on 22 March 1999 and by virtue s. 219(2) of the Act the winding-up of the respondent is deemed to have commenced on that date. Therefore, as from that date the full rigour of the relevant provisions of the Act and the WUR would apply to the respondent.

[22] In this case, when the payment of debt was made on 11 May 1999 the winding-up had already commenced. This payment, therefore, comes within the provision of s. 223 of the Act as disposition of the property of the respondent after the commencement of winding-up and is void unless the Court otherwise orders. Thus, the appellant could not in the circumstances claim exclusive right to the money paid. As Abdul Aziz Mohamad, JCA (as he then was) correctly said, "Other creditors, if there were any, had an interest in it." It is important to note that winding-up proceeding is a "class right" or "class remedy" as opposed to a writ action, this basic principle is embodied in the various provisions of the Act and the WUR, some of which will be considered in this judgment in due course.

[23] The prospective provisions that operate against the respondent are found in ss. 222, 223 and 224 of the Act. They operate immediately upon the presentation of the winding-up petition. (See s. 219(2)). The Court of Appeal in *Kredin Sdn. Bhd. v. Development & Commercial Bank Bhd.* [1995] 3 MLJ 304 explained the implication of s. 219 of the Act in the following words:

> Thus, s. 219 was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding up to the date when the order for winding up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors. Section 224 preserves the assets and effects of the company, and it is to safeguard this underlying principle that there is this notion of a relation back that once a winding-up order is made, it relates back to the date of the presentation of the winding up, ie the date when the winding up is deemed to have commenced. It follows that all attachments, sequestration, distress or execution put in force against the estate or effects of a company made within the interval of the presentation to wind up and the date when the order to wind-up is made by the court, are void. The fact that no winding-up order will ultimately be made makes no difference to this finding, as s. 219 is not concerned whether a winding-up order will ultimately be ordered or not, but that in mandatory tones it provides protection to unsecured creditors once a winding-up is deemed to have commenced, that is upon the presentation of the petition. Thus, to say that protection is only present as and when the winding-up order is eventually made is to go against the very intention of what Parliament had enacted. That protection arises once a winding up commences and the date of the commencement is nothing more than a question of fact ascertained from the date of the presentation of the winding up. For that reason, we consider that the decision reached in Pembinaan KSY's case has been rightly made as opposed to the one in this appeal before us.

[24] One pertinent point to note is that the fact that no winding-up order was ultimately made is of no consequence, as s. 219 of the Act is not concerned whether a winding-up order is eventually made or not, but seeks to provides protection to unsecured creditors upon the date of presentation of the petition.

[25] As a class action the petitioner rank in *pari passu* with other unsecured creditors if any. Further s. 226(4) of the Act provides that the winding-up order operates in favour of all creditors as if made on a joint petition.

[26] Since winding-up proceeding is a class action, there is therefore the need for it to be advertised as provided in r. 24 of the WUR. The relevant part reads:

> Every petition shall be advertised in Form 4 seven clear days or such longer time as the Court may direct before the hearing, …

[27] The reason behind this provision is plain, that is, to give notice to other creditors of the petition. Under r. 27 of the WUR every contributory or creditor of the company shall be entitled to be furnished with a copy of the petition by the petitioner on payments of the prescribed rate. For these reasons we agree with the appellant's submission that there is no power conferred on the winding-up court to dispense with the advertisement.

[28] Rule 27 further provides that if the petitioner fails to advertise the petition, the petition shall be cancelled by the Registrar and the petition shall be removed from the file unless otherwise directed by the Judge or Registrar.

[29] The importance of advertisement in the winding-up proceeding was succinctly stated by Mahadev Shanker JCA in the case of *Fairview School Bhd. v. Indrani a/p Rajaratnam (No. 1)* [1998] 1 MLJ 99 at p. 107:

> The point to note here is that in a s. 218 petition, the service is by advertisement. Consequently, all creditors and contributories are 'parties' who are deemed to be served and can participate in the proceedings. Whether or not they appear, they will be bound by the winding-up order because s. 226(4) of the Act deems that a winding-up order is made on the joint petition of all creditors and contributories.

[30] And under the proviso to r. 33(1)(a), (b) and (c) of the WUR the court may substitute another as a petitioner. All these provisions operate on the basis that there had been due advertisement of the petition. In short, we would conclude by saying that advertisement of the petition is a mandatory requirement in the winding-up proceeding and it cannot be dispensed with.

[31] We further agree with the submission of learned counsel for the appellant that the discretionary power given to the court under s. 221(2)(b) to dispense with advertisement must be read purposively and cannot be interpreted to give power to court to grant a complete dispensation with the advertisement. To do so would run counter to the WUR. The dispensing power must be exercised according to the exigencies of each individual case. This is supported by the English case of *Re United Stock Exchange Ltd., ex parte Philip & Kidd* [1885] 28 Ch D 183, where Pearson J held that the power of dispensation is wide but it cannot be exercised to frustrate the rule. He said at p. 184:

> The form of advertisement provided is one which invites all creditors and contributories who wish, to appear and oppose. It is said the Court may dispense with following the rule as to advertisements. No doubt the Court has very wide dispensing power, but the Court always exercises such power in such manner as to meet the exigencies of the particular case, and not to frustrate the rules, and *I am not aware of a single case in which the Court has dispensed with advertisements, and said that the contributories are not to have the benefit of the rule, and I should be very much surprised if I myself had an application made to me to dispense with the rule.* (emphasis added.)

[32] In *Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd.* [1988] 2 MLJ 447 our Supreme Court observed:

> … The companies (Winding up) Rules 1972 require that every petition shall be advertised, and in our opinion it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding up. If the advertisement would in fact cause such damage, this is not a ground to prevent a bona fide petitioner from advertising.

[33] In this appeal we are only concerned with the defence of absolute privilege which was relied upon by the appellant. If our answer to the question posed herein is in the negative then the appellant would succeed in his defence. As adverted to above we are satisfied that the advertisement is a mandatory requirement under the Act and the WUR. The fact the appellant had received payment of the debt is all the more reason for the need for the petition to be advertised. In any case the petition herein is based on the deemed insolvency of the respondent under s. 218(1)(e) read together with s. 218(2)(a) of the Act. It arose out of failure

of the respondent to pay its debt within three weeks from the service of demand on it. Therefore, the respondent cannot argue that it is able to pay its debt because under the Act the respondent is deemed to be unable to pay its debt by its own failure to comply with the demand. The payment of the debt after the petition had been filed does not in any way alter the situation.

[34] In the circumstances we would agree with Abdul Aziz JCA that "to omit to advertise the petition would directly assist the appellants to surreptitiously keep the money exclusively to themselves, in the event that there were other creditors." Therefore, under the scheme of the Act and the WUR the advertisement is clearly mandatory and in the circumstances the advertisement was absolutely privileged. This would fall squarely under the second category of absolute privilege as mentioned by Devlin LJ in *Lincoln v. Daniels* [1962] 1 QB 237.

[35] There is another point raised by the respondent in that the advertisement was not made in accordance with r. 24 which stipulates that the advertisement must be made "seven clear days or such longer time as the court may direct before the hearing". Here, the advertisement was made on 12 May 1999, whereas the hearing date was fixed for 3 September 1999. No order of court for such longer time was given. The respondent contends that the advertisement was in breach of r. 24 of the WUR. In this connection we would, agree with the view expressed in *GKM Amal Bhd. v. Bank Utama (M) Bhd.* [2004] 2 MLJ 12 that such non compliances is a mere irregularity and is therefore curable under r. 194(1) of the WUR.

[36] Further, since the advertisement is mandatory, the fact that the advertisement was done earlier than the prescribed time would have no bearing on the defence raised by the appellant. Even if it was done seven clear days before the hearing date it would still have the same effect on the respondent. The respondent is clearly on soft ground in as far as this point is concerned.

[37] On the issue that the appellant had agreed to discontinue the legal proceedings after the cheque had been cleared, we would hold that this could not be binding on the appellant on the basis of our earlier finding that the advertisement is a mandatory requirement under r. 24 of the WUR. Therefore, such agreement would be invalid as it is against the express provision of the rule which is intended to protect other creditors. In any case as stated

by Abdul Aziz JCA the agreement merely states that the appellant had agreed to the discontinuance or withdrawal of the petition but it does not say that the respondent agreed to dispense with the advertisement.

[38] Finally based on the view that we have taken, clearly this is a fit and proper case to be decided under O. 14A of RHC on the single issue as posed to this court. The outcome of the claim by the respondent rests entirely on our answer to the question posed which purely involved the application of the facts, which are not in dispute, to the relevant provisions of the Act and the WUR. On that premise we hold that the claim may appropriately be disposed of under O. 14A. (See *European Asian Bank AG v. Punjab and Sind* [1983] 2 All ER 508).

Conclusion

[39] Accordingly our answer to the question posed is in the negative and it follows, therefore, that the appeal herein is allowed with costs both here and in the courts below. Deposit to be refunded to the appellant.